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## A Criminal Defendant's First Bite at the Constitutional Apple: The Eleventh Circuit's Excessively Deferential Conception of "Adjudication on the Merits" in *Childers v. Floyd*

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# A CRIMINAL DEFENDANT’S FIRST BITE AT THE CONSTITUTIONAL APPLE: THE ELEVENTH CIRCUIT’S EXCESSIVELY DEFERENTIAL CONCEPTION OF “ADJUDICATION ON THE MERITS” IN *CHILDERS v. FLOYD*

**Abstract:** On November 13, 2013, in *Childers v. Floyd*, the U.S. Court of Appeals for the Eleventh Circuit found that Wyon Childers had failed to rebut the presumption that his Confrontation Clause claim was adjudicated on the merits. In this case, and a previous decision that led to it, the court conducted its habeas corpus review using a highly-deferential and vague conception of the threshold “adjudicated on the merits” inquiry. This Comment argues that the Eleventh Circuit and other circuits should reexamine their standards for determining whether federal claims have been adjudicated on the merits by state courts in order to align themselves with U.S. Supreme Court jurisprudence and to provide a more accurate and just standard to the federal district courts.

## INTRODUCTION

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), individuals seeking habeas corpus review in the federal court system face a difficult challenge due to the highly-deferential standard applied to state court decisions.<sup>1</sup> The state courts, however, are only entitled to this deference when they adjudicate a habeas petitioner’s federal claim on the merits.<sup>2</sup>

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<sup>1</sup> See Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2012) (allowing habeas review for claims that have been adjudicated on the merits only where there was an unreasonable interpretation of federal law or underlying facts at the state level); *Childers v. Floyd* (*Childers IV*), 642 F.3d 953, 987 (11th Cir. 2011) (en banc) (Wilson, J., concurring) (describing the standard under the AEDPA as involving “nearly insurmountable deference”), *vacated*, 133 S. Ct. 358 (2013), *opinion reinstated*, 736 F.3d 1331 (11th Cir. 2013); Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 76, 87 (2005) (arguing that the AEDPA created marked impediments to the ability of prisoners to obtain habeas review); Nathaniel Koslof, Comment, *Insurmountable Hill: How Undue AEDPA Deference has Undermined the Atkins Ban on Executing the Intellectually Disabled*, 54 B.C. L. REV. E. SUPP. 189, 189 (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/15>, *archived at* <http://perma.cc/7V74-ZS3X> (explaining that habeas review under the AEDPA is “severely circumscribed” and involves “stringent level of deference”).

<sup>2</sup> See *Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1097 (2013) (finding that the deferential AEDPA standard does not apply when the state court does not consider the merits of a petitioner’s claim);

Although the U.S. Supreme Court has offered guidance on how to determine whether a state court adjudicated a federal claim on the merits, there is nevertheless a lack of uniformity amongst the circuit courts in regards to the proper standard and how to apply it.<sup>3</sup>

Part I of this Comment provides a background of habeas corpus review under AEDPA, as well as a brief procedural and factual history of *Childers v. Floyd*.<sup>4</sup> Part II then examines the inconsistent manner in which the circuit courts have interpreted and applied U.S. Supreme Court precedent when determining whether a habeas petitioner's federal claim has been adjudicated on the merits.<sup>5</sup> Finally, Part III of this Comment argues that the Eleventh Circuit and other circuits should reexamine their standards for determining w a federal claim has been "adjudicated on the merits" in order to protect against a per se application of AEDPA deference.<sup>6</sup>

## I. HABEAS REVIEW UNDER AEDPA AND THE THRESHOLD "ADJUDICATED ON THE MERITS" INQUIRY

Section A of this Part provides an overview of habeas corpus review, as well as the implications of the AEDPA for individuals seeking habeas review.<sup>7</sup> Section B then examines the meaning and significance of the threshold "adjudicated on the merits" inquiry.<sup>8</sup> Finally, Section C offers a summary of the factual and procedural details of the criminal case against Wyon Childers.<sup>9</sup>

### *A. Habeas Corpus and the Anti-Terrorism and Effective Death Penalty Act*

Under 28 U.S.C. § 2254, a federal court shall consider an application for a writ of habeas corpus for an individual who is incarcerated pursuant to a judgment of a state court that is contrary to or in violation of the Constitution or laws or treaties of the United States.<sup>10</sup> Habeas corpus review stands as a sig-

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Harrington v. Richter, 562 U.S. 86, 91, 99–100 (2011) (explaining that habeas review is "limited" when a claim has been adjudicated on the merits by a state court).

<sup>3</sup> See *Williams*, 133 S. Ct. at 1091; *Richter*, 562 U.S. at 99–100; see also *Childers v. Floyd* (*Childers V*), 736 F.3d 1331, 1334 (11th Cir. 2013) (en banc) (per curiam) (determining that claim was adjudicated on the merits by state court in the absence of some indication that the state court clearly overlooked it), *cert. denied*, 134 S. Ct. 1558 (2014); *Lint v. Prelesnik*, 542 F. App'x 472, 477 (6th Cir. 2013) (finding that the threshold inquiry requires scrutiny because there are multiple ways that a state court may fail to adjudicate a claim on the merits).

<sup>4</sup> See *infra* notes 7–33 and accompanying text.

<sup>5</sup> See *infra* notes 34–69 and accompanying text.

<sup>6</sup> See *infra* notes 70–86 and accompanying text.

<sup>7</sup> See *infra* notes 10–15 and accompanying text.

<sup>8</sup> See *infra* notes 16–20 and accompanying text.

<sup>9</sup> See *infra* notes 21–33 and accompanying text.

<sup>10</sup> 28 U.S.C. § 2254(a) (2012); *Richter*, 562 U.S. at 91 ("The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.")

nificant procedural safeguard aiming to provide relief to individuals who have exhausted all their available remedies at the state court level and who are incarcerated as a result of improper state court determinations of their rights.<sup>11</sup> In 1996, Congress passed the AEDPA with the goal of limiting overuse of habeas corpus and preventing delays in death penalty cases.<sup>12</sup>

After the passage of the AEDPA in 1996, petitioners seeking habeas relief from a state court judgment are subject to a more deferential standard of review.<sup>13</sup> 28 U.S.C. § 2254(d), as amended by the AEDPA, states that habeas corpus relief shall only be granted in two narrow situations: (1) when the decision of the state court was “contrary to, or involved an unreasonable application of, clearly established federal law,” or (2) when the decision of the state court was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>14</sup> A crucial caveat to the AEDPA, however, is that the deferential approach to habeas review under § 2254(d) only applies to federal claims that were in fact “adjudicated on the merits” by a state court.<sup>15</sup>

### B. The “Adjudicated on the Merits” Requirement

The U.S. Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit have interpreted the meaning of the § 2254(d) “adjudicated on the merits” requirement in a broad and permissive manner.<sup>16</sup> In order to constitute an

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<sup>11</sup> See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (stating that petitioners must exhaust state level remedies before seeking habeas review); Margery I. Miller, Note, *A Different View of Habeas: Interpreting AEDPA’s “Adjudicated on the Merits” Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593, 2594 (2004) (describing habeas corpus review as important recourse for state prisoners who have been wrongfully imprisoned).

<sup>12</sup> See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.); Entzeroth, *supra* note 1, at 87 (citing H.R. REP. NO. 104-519, at 111 (1996) (Conf. Rep.)).

<sup>13</sup> See 28 U.S.C. § 2254(d); *Childers IV*, 642 F.3d at 967 n.14; Miller, *supra* note 11, at 2595 (explaining how the AEDPA increased the deference that federal courts give to state court decisions when reviewing habeas petitions).

<sup>14</sup> See 28 U.S.C. § 2254(d)(1)–(2).

<sup>15</sup> See *id.* § 2254(d); Miller, *supra* note 11, at 2612–13 (pointing out that AEDPA deference does not attach to state court decisions that were not adjudicated on the merits). Accordingly, federal courts conducting habeas review must determine whether or not the federal claim was adjudicated on the merits by the state court before applying the deferential AEDPA standard for habeas review provided by § 2254(d). See Miller, *supra* note 11, at 2611.

<sup>16</sup> See *Richter*, 562 U.S. at 98–102 (stating that a federal claim can be presumed to have been adjudicated on the merits by a state court provided there are no indications or state law procedural principles suggesting otherwise); *Childers IV*, 642 F.3d at 968 (defining an adjudication on the merits as any state court determination that does not rely exclusively on state law procedural principles); *Wright v. Sec’y for the Dep’t of Corr.*, 278 F.3d 1245, 1255–56 (11th Cir. 2002) (explaining that AEDPA was intended to allow great deference to state court decisions and that a federal claim will be considered to have been adjudicated on the merits provided that the state court’s determination was

adjudication on the merits, however, a state court's decision must reach the substance of the habeas petitioner's federal claim and cannot rely on procedural grounds.<sup>17</sup>

The determination as to whether a federal claim has or has not been adjudicated on the merits directly impacts what standard the federal court applies to review a petitioner's habeas petition.<sup>18</sup> Whereas claims that have been adjudicated on the merits are subject to AEDPA deference, petitioners who raise federal claims that have not been adjudicated on the merits are entitled to de novo review.<sup>19</sup> Although the U.S. Supreme Court has instructed federal courts to presume that a claim has been adjudicated on the merits by a state court, the Court has explicitly and repeatedly stated that this presumption is rebuttable.<sup>20</sup>

### C. *Procedural and Factual Background of Childers v. Floyd*

Wyon Dale Childers, a former Escambia County Commissioner, was indicted on June 17, 2002 in the Circuit Court for Escambia County, Florida for unlawful compensation and bribery.<sup>21</sup> The State contended that Childers had

not based solely on state law procedural principles). Underlying this deference is a longstanding principle that a state court must be given the chance to decide the merits of a claim before a petitioner can seek habeas relief. *See Childers IV*, 642 F.3d at 967 (citing *Cone v. Bell*, 556 U.S. 449, 465 (2009)).

<sup>17</sup> *See Williams*, 133 S. Ct. at 1100 (stating that an adjudication on the merits does not include state court determinations that rely solely on procedural grounds); *Amado v. Gonzalez*, 758 F.3d 1119, 1130–31 (9th Cir. 2014) (citing *Lambert v. Blodgett*, 383 F.3d 943, 969 (9th Cir. 2004)) (explaining that a state court determination must consider the substance, and not just the procedural aspects, of an individual's federal claim); *Childers IV*, 642 F.3d at 968; BRIAN R. MEANS, *POSTCONVICTION REMEDIES*, § 29:6 (2014) (commenting that a state court decision that does not address the substance of an individual's federal claim does not satisfy the adjudication on the merits requirement).

<sup>18</sup> *See Childers IV*, 642 F.3d at 967–68 (explaining that whether or not a claim is determined to have been adjudicated on the merits determines the level of deference that the federal court will apply to the state court decision); Meredith Regan, Comment, *Lies, Damn Lies, and White Ink: The Convenient Fiction of Adjudication on the Merits in Murdoch v. Castro*, 52 B.C. L. REV. E. SUPP. 135, 138 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/12>, archived at <http://perma.cc/D45R-EY3L> (highlighting that only claims that have been adjudicated on the merits are subject to AEDPA deference).

<sup>19</sup> *See* 28 U.S.C. § 2254(d); *Cone*, 556 U.S. at 472; *see also supra* note 18 and accompanying text (discussing the implications of the adjudicated on the merits inquiry on the level of deference that is applied under the AEDPA). A de novo hearing occurs when the reviewing court considers the matter anew, “giving no deference to a lower court's findings.” BLACK'S LAW DICTIONARY 789 (9th ed. 2009).

<sup>20</sup> *See Williams*, 133 S. Ct. at 1091, 1096–97; *Richter*, 562 U.S. at 99–100; *infra* notes 40–43 (discussing how the U.S. Supreme Court has declined to make the presumption that a claim has been adjudicated on the merits irrebuttable).

<sup>21</sup> *Childers v. Floyd (Childers III)*, 608 F.3d 776, 780 (11th Cir. 2010), *reh'g en banc* 642 F.3d 953 (11th Cir. 2011), *vacated*, 133 S. Ct. 1452 (2013), *opinion reinstated*, 736 F.3d 1331 (11th Cir. 2013). Childers was also indicted on one count of money laundering. *See id.* The indictments stemmed from actions committed by Childers, then an Escambia County Commissioner, surrounding the purchase of the Pensacola Soccer Complex by the Escambia County Board of County Commissioners. *Childers v. State (Childers I)*, 936 So. 2d 585, 587 (Fla. Dist. Ct. App. 2006) (en banc) (per

made a series of payments to Willie Junior, who also served as an Escambia County Commissioner at the time, in exchange for his vote to purchase a piece of property from Joe Elliot.<sup>22</sup> Facing criminal charges of his own, Junior accepted a plea agreement where he agreed to testify against both Elliot and Childers.<sup>23</sup>

In December 2002, Junior testified as a witness for the State in the trial of Elliot, where Elliot was acquitted.<sup>24</sup> In the period between the Elliot acquittal and Childers's trial, Junior altered his testimony to include further incriminating details about Childers's actions and conduct.<sup>25</sup> The State subsequently attempted to revoke Junior's plea agreement, but was precluded from doing so.<sup>26</sup> During Childers's trial, defense counsel was not permitted to cross-examine Junior about the State's attempted revocation of his plea agreement because the trial court determined that the evidence was irrelevant.<sup>27</sup> Childers was convicted in April 2003 of bribery and unlawful compensation.<sup>28</sup>

In 2006, in *Childers v. State (Childers I)*, Childers appealed his conviction to the Florida District Court of Appeal on the grounds that the trial court improperly prevented him from cross-examining Junior on the State's attempt to revoke Junior's plea agreement.<sup>29</sup> Although the Florida District Court of Appeal determined that the trial court had erred by finding the evidence irrelevant, it found that the probative value of the evidence was outweighed by the risk of unfair prejudice it created and therefore the convictions were upheld.<sup>30</sup>

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curiam), *rev'd sub nom.* *Childers v. Floyd*, 608 F.3d 776 (11th Cir. 2010), *vacated*, 133 S. Ct. 1452 (2013), *opinion reinstated*, 736 F.3d 1331 (11th Cir. 2013).

<sup>22</sup> *Childers I*, 936 So. 2d at 587.

<sup>23</sup> *Childers III*, 608 F.3d at 780.

<sup>24</sup> *Childers I*, 936 So. 2d at 588.

<sup>25</sup> *Id.* at 588–89.

<sup>26</sup> *Id.* at 589–90.

<sup>27</sup> *Id.* at 590, 592. The evidence was found to be irrelevant by the trial court under section 90.401 of the Florida Statutes. *See id.* Section 90.401 states that “[r]elevant evidence is evidence tending to prove or disprove a material fact.” FLA. STAT. § 90.401 (2014). Defense counsel was, however, able to cross-examine Junior extensively on his plea agreement and inconsistent statements. *Childers I*, 936 So. 2d at 590–91.

<sup>28</sup> *Childers III*, 608 F.3d at 787.

<sup>29</sup> 936 So. 2d at 587. Childers also based his appeal on the trial court's refusal to allow questioning of Junior about the Elliot acquittal. *Id.*

<sup>30</sup> *Id.* at 592–93, 596. The court considered the evidence under Section 90.403 of the Florida Statutes. *Id.* Section 90.403 states that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.” FLA. STAT. § 90.403. The Florida District Court of Appeal also affirmed the trial court's decision to exclude the acquittal in the criminal case against Elliot. *Childers I*, 936 So. 2d at 596. Childers subsequently sought certification of questions to the Florida Supreme Court, but his Motion for Certification was denied. *Childers v. State*, 936 So. 2d 619, 622 (Fla. Dist. Ct. App. 2006) (en banc) (per curiam) (denying Childers's Motion for Certification due to lack of any substantial questions).

On December 14, 2006, Childers filed a petition for writ of habeas corpus, arguing that his Sixth Amendment Confrontation Clause rights were violated when the trial court blocked cross-examination concerning the State's attempt to revoke Junior's plea bargain.<sup>31</sup> The U.S. District Court for the Northern District of Florida denied Childers' habeas petition.<sup>32</sup> Childers appealed the denial of his habeas petition to the U.S. Court of Appeals for the Eleventh Circuit.<sup>33</sup>

## II. DIVERGENT ANALYSES OF THE THRESHOLD "ADJUDICATED ON THE MERITS" INQUIRY

In *Childers IV* and *Childers V*, as well as in several circuit court cases, the adjudicated on the merits requirement has emerged as a divisive issue that has resulted in several competing interpretations.<sup>34</sup> Section A of this Part provides an overview of recent U.S. Supreme Court jurisprudence on the "adjudicated on the merits" requirement.<sup>35</sup> Section B and Section C of this Part examine the Eleventh Circuit's interpretation of the adjudication on the merits requirement in *Childers IV* and *Childers V* respectively.<sup>36</sup> Section D of this Part then looks at the disparate treatment of the threshold inquiry amongst the U.S. Circuit Courts of Appeals.<sup>37</sup>

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<sup>31</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); *Childers v. Floyd (Childers II)*, No. 3:07cv243/LAC/EMT, 2008 WL 2945555, at \*1, 7 (N.D. Fla. July 24, 2008). Finding that Childers had been provided an adequate opportunity to confront Junior, United States Magistrate Judge Elizabeth M. Timothy recommended that the petition be denied. *Childers II*, 2008 WL 2945555, at \*20–22.

<sup>32</sup> *Childers II*, 2008 WL 2945555, at \*1. Childers subsequently filed a Notice of Appeal and a Motion for Certificate of Appealability that were both denied by the U.S. District Court for the Northern District of Florida. *Id.*

<sup>33</sup> *Childers III*, 608 F.3d at 779–80; *Childers II*, 2008 WL 2945555, at \*1, 7. Childers received a certificate of appealability from the district court on the sole issue of whether his Confrontation Clause rights were unconstitutionally limited by the state court. *Childers IV*, 642 F.3d at 965. The Eleventh Circuit held that Childers's Confrontation Clause rights had been violated by the trial court and accordingly remanded the case to the U.S. District Court in order to grant Childers's habeas petition. *Childers III*, 608 F.3d at 791–92, 794.

<sup>34</sup> *Compare Sadler v. Howes*, 541 F. App'x 682, 689 (6th Cir. 2013) (reviewing a state court's determination only to see if the lower court overlooked a claim due to "sheer inadvertence"), *Childers v. Floyd (Childers V)*, 736 F.3d 1331, 1334 (11th Cir. 2013) (en banc) (per curiam) (looking only at whether or not the state court completely overlooked a federal claim in order to determine whether or not the *Richter* presumption is rebutted), *cert. denied*, 134 S. Ct. 1558 (2014), and *Childers v. Floyd (Childers IV)*, 642 F.3d 953, 987 (11th Cir. 2011) (en banc) (analyzing a state court's determination only to see if it relied exclusively on state law procedural grounds), *vacated*, 133 S. Ct. 358 (2013), *opinion reinstated*, 736 F.3d 1331 (11th Cir. 2013), with *Amado v. Gonzalez*, 758 F.3d 1119, 1131 (9th Cir. 2014) (considering multiple factors and the state court's reasoning when determining whether or not a claim was adjudicated on the merits).

<sup>35</sup> See *infra* notes 38–43 and accompanying text.

<sup>36</sup> See *infra* notes 44–61 and accompanying text.

<sup>37</sup> See *infra* notes 62–69 and accompanying text.

### A. U.S. Supreme Court Guidance on the Threshold Inquiry

In the years following the passage of AEDPA, a uniform interpretation and application of the 28 U.S.C. § 2254(d) “adjudicated on the merits” requirement has eluded federal courts reviewing habeas petitions.<sup>38</sup> In two important cases in 2011 and 2013, the U.S. Supreme Court granted certiorari in order to attempt to elucidate the proper definition and scope of the threshold “adjudicated on the merits” inquiry.<sup>39</sup>

In 2011, in *Harrington v. Richter*, the U.S. Supreme Court ruled that a summary disposition by a state court that contains no opinion or citation to governing legal principles constitutes an adjudication on the merits of a petitioner’s claim and is therefore subject to AEDPA deference.<sup>40</sup> Despite the high degree of deference accorded to state court decisions under § 2254(d), the Court in *Richter* found that the presumption that a state court has adjudicated a petitioner’s claim on its merits can be rebutted.<sup>41</sup>

In 2013, in *Johnson v. Williams*, the U.S. Supreme Court extended the *Richter* presumption to situations where a state court addresses some, but not all, of a petitioner’s claims in a written opinion and rejects a petitioner’s federal claim without explicitly considering it.<sup>42</sup> Although it fortified an already robust presumption that a state court has adjudicated a federal claim on its merits, the Court expressly declined to make the presumption irrebuttable.<sup>43</sup>

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<sup>38</sup> See 28 U.S.C. § 2254(d) (2012); Miller, *supra* note 11, at 2613–14 (pointing out that, as of 2004, there was a split amongst the circuit courts as to how to apply the “adjudicated on the merits” requirement due to a lack of clarity from Congress); Claudia Wilner, “We Would Not Defer to That Which Did Not Exist”: AEDPA Meets the Silent State Court Opinion, 77 N.Y.U. L. REV. 1442, 1451 (2002) (arguing that, as of 2002, a question existed amongst the federal courts as to how to properly define and apply the “adjudicated on the merits” requirement). See generally John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 273 (2002) (noting that, as of 2002, the U.S. Supreme Court had “said little about how § 2254(d) works beyond that it limits a federal court’s power to grant relief”).

<sup>39</sup> See *Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094, 1096 (2013); *Harrington v. Richter*, 562 U.S. 86, 99–100 (2011).

<sup>40</sup> 562 U.S. at 99–100; see 28 U.S.C. § 2254(d). In other words, a presumption of AEDPA deference applies to state court decisions provided that the opinion does not contain any “indication or state law procedural bar to the contrary.” See *Richter*, 562 U.S. at 99 (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)). Prior to *Richter*, the U.S. Supreme Court in *Early v. Packer* held that a state court’s failure to cite, or even be aware of, relevant U.S. Supreme Court precedent in a written opinion did not preclude a finding that the state court’s decision was entitled to AEDPA deference. See *Early v. Packer*, 537 U.S. 3, 8 (2002).

<sup>41</sup> See *Richter*, 562 U.S. at 99–100. In particular, the presumption may be overcome when a federal court has reason to believe that a state court’s decision was likely based on something other than an adjudication of the merits of the petitioner’s federal claim. See *id.*

<sup>42</sup> See 133 S. Ct. at 1091, 1094, 1096.

<sup>43</sup> See *id.* In describing when the “strong” *Richter* presumption can be rebutted, the Court discussed the possibility that a state court may fail to adjudicate a petitioner’s federal claim when it applies a state law standard that is less protective than the relevant federal law or constitutional standard. See *id.* at 1096.

### B. The Broad Definition Established in *Childers IV*

In 2011, shortly after the U.S. Supreme Court weighed in on the issue in *Richter*, in *Childers IV*, the U.S. Court of Appeals for the Eleventh Circuit sought to define the threshold inquiry of when a federal claim can be considered “adjudicated on its merits” by a state court.<sup>44</sup> As part of its review of *Childers*’s habeas petition, the en banc majority defined adjudication on the merits in a broad and inclusive manner.<sup>45</sup> The Eleventh Circuit held that all federal claims are to be considered adjudicated on the merits provided that the state court determination does not rely exclusively on a state law procedural bar.<sup>46</sup>

The majority stated that its definition of “adjudicated on the merits” in *Childers IV* was essentially the same as the definition provided by the U.S. Supreme Court in *Richter*.<sup>47</sup> When interpreting the protective language from *Richter*, the majority in *Childers IV* reasoned that “any indication or state law procedural principles to the contrary” referred only to instances where a state court had in fact relied exclusively on a state law procedural bar.<sup>48</sup> Similarly, the majority found that the language in *Richter* allowing the presumption to be overcome if “there is reason to think some other explanation for the state court’s decision is more likely” should be limited to instances where it appears that the state court relied exclusively on a state law procedural bar.<sup>49</sup>

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<sup>44</sup> See *Childers IV*, 642 F.3d at 957.

<sup>45</sup> See *id.* at 968–69. In making this determination, the majority recognized that the term “adjudicated on the merits” was already defined in a broad and highly-deferential manner by previous U.S. Supreme Court and Eleventh Circuit cases. See *id.* at 968; see also *Richter*, 562 U.S. at 99–100 (holding that summary dispositions by state courts are presumed, subject to rebuttal, to constitute an adjudication on the merits); *Wright v. Sec’y for Dep’t of Corr.*, 278 F.3d 1245, 1255–56 (11th Cir. 2002) (holding that decisions, and not just opinions, may satisfy the requirement that a federal claim was adjudicated on its merits by a state court).

<sup>46</sup> See *Childers IV*, 642 F.3d at 968–69 & n.16 (citing *Williams v. Allen*, 598 F.3d 778, 796 (11th Cir. 2010)). The majority’s definition also required that the federal claim presented by the petitioner be the same one that was considered by the state court. *Id.* at 968–69; see *Early*, 537 U.S. at 8 (2002).

<sup>47</sup> See *Richter*, 562 U.S. at 99–100; *Childers IV*, 642 F.3d at 968. In *Richter*, the Court stated that a federal claim may be presumed to have been adjudicated on the merits by the state court “in the absence of any indication or state law procedural principles to the contrary.” See 562 U.S. at 99–100.

<sup>48</sup> See *Richter*, 562 U.S. at 99–100; *Childers IV*, 642 F.3d at 968–69. This implicit reasoning is evinced by the fact that the majority concluded that its own definition of “adjudicated on the merits” was essentially the same as that of the U.S. Supreme Court in *Richter*, yet included no reference to any bases for finding that a state court failed to adjudicate a claim on the merits other than a clear application of a state procedural bar. See *Richter*, 562 U.S. at 99–100; *Childers IV*, 642 F.3d at 968–69.

<sup>49</sup> See *Richter*, 562 U.S. at 99–100; *Childers IV*, 642 F.3d at 968 n.16. In incorporating this language into its decision, the Court in *Richter* cited to a case involving a federal claim that was determined by a state court on the grounds of a state law procedural bar. See 562 U.S. at 99–100 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). The majority in *Childers IV* concluded that the language could not be divorced from the context of *Ylst* and therefore it was not applicable to cases that

In his concurring opinion, Judge Wilson sharply criticized the majority for needlessly reworking the U.S. Supreme Court's definition of "adjudicated on the merits."<sup>50</sup> He argued that the majority's strictly procedural definition of the *Richter* presumption represented a substantial misunderstanding of the guidance provided by the Court.<sup>51</sup> Judge Wilson also expressed concern that the majority's minimization of the protective language from *Richter* would unfairly deny certain petitioners, such as Childers, the right to actually have their federal claims adjudicated on the merits by either a state or federal court.<sup>52</sup> In lieu of the majority's altered *Richter* presumption, the concurring opinion advocated for the court to retain the language in *Richter* that directs courts reviewing habeas petitions to give meaningful consideration to the threshold "adjudicated on the merits" inquiry.<sup>53</sup> Following the decision in *Childers IV*, the U.S. Supreme Court granted certiorari and remanded the case to the Eleventh Circuit in light of the decision in *Williams*.<sup>54</sup>

### C. *The Limited Reevaluation of the Definition in Childers V*

In 2013, on remand, the Eleventh Circuit per curiam majority in *Childers V* reinstated its decision in *Childers IV* and held that *Williams* was not contrary to its earlier determination.<sup>55</sup> The majority read *Williams* as impacting its pro-

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did not involve a state law procedural bar. *See Childers IV*, 642 F.3d at 968 n.16 (citing *Ylst*, 501 U.S. at 803).

<sup>50</sup> *See Childers IV*, 642 F.3d at 981 (Wilson, J., concurring). According to Judge Wilson, a major consequence of the majority's definition of the term "adjudicated on the merits" was that it would deleteriously and improperly diminish the ability of future habeas petitioners to rebut the *Richter* presumption. *See id.* at 987. In her dissent, Judge Barkett also argued that the majority improperly redefined the *Richter* presumption by interpreting "adjudicated on the merits" in a purely procedural manner. *See id.* at 990 n.2 (Barkett, J., dissenting).

<sup>51</sup> *See id.* 981–82 (Wilson, J., concurring). Judge Wilson attributed the majority's broad definition of "adjudicated on the merits" to its reliance on *Early*. *See id.* at 982–83 (citing *Early*, 537 U.S. at 7–8). Judge Wilson noted, however, that the Court in *Early* never actually commented on a proper definition of the term "adjudicated on the merits" and therefore *Early* provided no support for the majority's exclusively procedural interpretation of the *Richter* presumption. *See id.* at 983–85.

<sup>52</sup> *See id.* at 981–982, 988. Specifically, Judge Wilson argued that the majority's broad and procedurally-based definition of "adjudicated on the merits" would cause courts reviewing habeas petitions to automatically equate the absence of a state procedural bar with an actual adjudication on the merits, even where a state court may have failed to consider a petitioner's claim or evaluated the claim under a less protective, state law standard. *See id.* at 985.

<sup>53</sup> *See id.* at 986–87.

<sup>54</sup> *See Childers v. Floyd*, 133 S. Ct. 1452, 1452 (2013); *supra* notes 42–43 and accompanying text (explaining how the Court in *Williams* extended the *Richter* presumption to instances where a state court addresses some, but not all, of the petitioner's claims).

<sup>55</sup> *See Childers V*, 736 F.3d at 1334–35 (citing *Williams*, 133 S. Ct. at 1088). In *Williams*, the Court extended the *Richter* presumption to written state court opinions that do not expressly consider a habeas petitioner's federal claim. *See* 133 S. Ct. at 1096. The Court stated that the *Richter* presumption is rebuttable and petitioners' claims should not be treated as per se adjudicated on the merits by the state court. *See id.* at 1096–97.

cedurally-oriented interpretation of “adjudicated on the merits” in *Childers IV* only in instances where there was clear evidence that the state court “inadvertently overlooked” the federal claim presented by the habeas petitioner.<sup>56</sup> In support of its finding that the state court did not overlook Childers’s claim, the majority determined that Confrontation Clause claim was subsumed and properly adjudicated under the state law analysis performed by the Florida District Court of Appeal.<sup>57</sup> As the state court did not inadvertently overlook Childers’s Confrontation Clause claim, the majority affirmed the previous denial of Childers’s habeas petition on the grounds that his claim had been adjudicated on the merits.<sup>58</sup>

The dissenting opinion again argued that the Eleventh Circuit denied Childers’s federal claim without providing a primary adjudication of the claim on the merits.<sup>59</sup> The dissent contended that the state law standard applied by the Florida District Court of Appeal was a less protective standard than the Confrontation Clause and, therefore, the state court’s decision could not be considered an actual adjudication on the merits pursuant to *Williams*.<sup>60</sup> Additionally, the dissent advocated for an interpretation of *Richter* that recognizes both the substantive and procedural aspects that must be considered when evaluating whether a habeas petitioner has rebutted the *Richter* presumption.<sup>61</sup>

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<sup>56</sup> See *Childers V*, 736 F.3d at 1334–35.

<sup>57</sup> *Id.* at 1335; see U.S. CONST. amend. VI; FLA. STAT. § 90.403 (2014) (“Relevant evidence is inadmissible if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”). As part of this determination, the *Childers V* majority held that Section 90.403 of the Florida Statutes provided Childers with the same degree of protection to confront witnesses testifying against him that he was entitled to receive under the Confrontation Clause. See 736 F.3d at 1334–35; note 26 and accompanying text.

<sup>58</sup> See *Childers V*, 736 F.3d at 1335. In support of this finding, the majority reasoned that the Florida District Court of Appeal’s explicit reference to and analysis of the Confrontation Clause in several concurring and dissenting opinions was clear evidence that the claim had not been overlooked by the state court. See *id.* at 1335 n.9.

<sup>59</sup> See *id.* at 1335–36 (Wilson, J., dissenting) (arguing that the state court’s use of the less-protective state law evidentiary standard did not constitute an adjudication on the merits of Childers’ confrontation clause claim); *Childers IV*, 642 F.3d at 988 (Wilson, J., concurring) (same).

<sup>60</sup> See FLA. STAT. § 90.403; *Williams*, 133 S. Ct. at 1097 (holding that the presumption that a state court has properly adjudicated a federal claim on the merits can be rebutted where the state law standard that is applied is less protective than the relevant federal standard); *Childers V*, 736 F.3d at 1335–36 (Wilson, J., dissenting). Further, Judge Wilson pointed out that the majority failed to cite any authority that supported the majority’s finding that the Confrontation Clause could be properly subsumed by the Florida Rules of Evidence. See *Childers V*, 736 F.3d at 1336.

<sup>61</sup> See U.S. CONST. amend. VI; *Childers V*, 736 F.3d at 1336. Judge Wilson analyzed the issue as to whether Childers’s Confrontation Clause claim had been adjudicated on the merits using protective language from both *Richter* and *Williams*. See *Childers V*, 736 F.3d at 1335–36 (citing *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 99–100). Specifically, Judge Wilson argued that, because Florida Statutes Section 90.403 and the Confrontation Clause involve disparate procedural protections and standards of review, it was likely that the state court failed to adjudicate Childers’s federal claim on the merits due to its reliance on the less-protective state law standard. See *id.* at 1336. The majority’s

*D. The Varying Conceptions of “Adjudicated on the Merits”  
Amongst the Circuits*

Even after the U.S. Supreme Court’s decisions in *Richter* and *Williams*, the threshold inquiry of whether a state court has adjudicated a petitioner’s federal claim on the merits continues to represent a divisive issue both amongst and within the individual U.S. Circuit Courts of Appeals.<sup>62</sup> The conflict stems in large part from disparate interpretations of the language in *Richter* and *Williams* preserving a petitioner’s ability to rebut the presumption that a federal claim was adjudicated on the merits.<sup>63</sup>

Recent case law from the U.S. Court of Appeals for the Sixth Circuit is indicative of the tension and lack of clarity that exists regarding how to determine the threshold inquiry.<sup>64</sup> In 2013, in *Sadler v. Howes*, the Sixth Circuit interpreted *Williams* narrowly and found that the petitioner failed to rebut the *Richter* presumption because the state court had not inadvertently ignored the petitioner’s federal claim.<sup>65</sup> Conversely, in 2013, in *Lint v. Prelesnik*, the Sixth Circuit reasoned that “sheer inadvertence” is only one situation that can lead to a finding that the *Richter* presumption was rebutted by a petitioner.<sup>66</sup>

Furthermore, whereas the Eleventh Circuit adopted a very narrow interpretation of *Williams* in *Childers V*, the U.S. Court of Appeals for the Ninth Circuit has repeatedly focused on the protective language of *Richter* and *Williams* in addressing the threshold inquiry of whether a claim was adjudicated

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opinion, on the other hand, only makes reference to *Richter* in so far as it is necessary to outline the procedural history of the case. *See id.* at 1332–33 (per curiam).

<sup>62</sup> *See Amado*, 758 F.3d at 1131 (using a searching standard to determine whether an adjudication on the merits has occurred that includes the protective language from *Richter*); *Childers V*, 736 F.3d at 1334–35 (considering only whether a petitioner’s claim was “inadvertently” overlooked by the state court); *see also Sadler*, 541 F. App’x at 689 (considering only whether a state court did not address a claim due to “sheer inadvertence”); *Lint v. Prelesnik*, 542 F. App’x 472, 477 (6th Cir. 2013) (determining that the “sheer inadvertence” of a state court is only one circumstance that could allow the *Richter* presumption to be rebutted).

<sup>63</sup> *Compare Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014) (recognizing that a rebuttable presumption means that situations can arise where no state court record can establish an adequate basis for determining that a claim was adjudicated on the merits), *with Sadler*, 541 F. App’x at 689 (interpreting the protective language of *Richter* and *Williams* as dicta and reviewing the state court’s decision only for sheer inadvertence), *and Childers V*, 736 F.3d at 1334–35 (reviewing the state court’s decision only for sheer inadvertence).

<sup>64</sup> *See Sadler*, 541 F. App’x at 689; *Lint*, 542 F. App’x at 477.

<sup>65</sup> *See* 541 F. App’x at 689; Petition for Writ of Certiorari at 24, *Childers V*, 736 F.3d 1331 (No. 13-951) (arguing that the court in *Sadler* created a narrow definition of the adjudicated on the merits requirement through its selective and limited use of language from *Williams*). In reaching this determination, the majority found that the language in *Williams* stating that the *Richter* presumption was rebuttable in “unusual circumstances” was dicta. *See Sadler*, 541 F.App’x. at 689.

<sup>66</sup> *See* 542 F. App’x at 477. The court in *Lint* interpreted the protective language from *Richter* and *Williams* as impacting its determination of the threshold inquiry. *See id.* (citing *Williams*, 133 S. Ct. at 1096–97).

on the merits.<sup>67</sup> In 2014, in *Amado v. Gonzalez*, the Ninth Circuit explicitly incorporated the protective language from *Richter* and *Williams* into its standard for evaluating the threshold inquiry.<sup>68</sup> Similarly, in 2013, in *Ayala v. Wong*, the Ninth Circuit emphasized that, although *Richter* and *Williams* directed the courts to give deference to state court decisions, the *Richter* presumption is unquestionably rebuttable.<sup>69</sup>

### III. THE ELEVENTH CIRCUIT SHOULD CLARIFY ITS DEFINITION OF “ADJUDICATED ON THE MERITS” IN ORDER TO GUARD AGAINST AN EFFECTIVELY IRREBUTTABLE PRESUMPTION

Although the Eleventh Circuit attempted to add clarity to the threshold inquiry in *Childers IV*, the combined impact of *Childers IV* and *Childers V* led to the creation of a rigid and seemingly impenetrable standard for determining whether a particular federal claim was “adjudicated on the merits.”<sup>70</sup> Moving

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<sup>67</sup> See *Amado*, 758 F.3d at 1131; *Ayala v. Wong*, 756 F.3d 656, 665–66, 669 (9th Cir. 2013); *Cannedy v. Adams*, 706 F.3d 1148, 1157, 1159 (9th Cir. 2013). In these cases, the Ninth Circuit has broadly interpreted *Williams* as affirming and extending the rebuttable *Richter* presumption, rather than as providing a definitive and exhaustive framework to evaluate the threshold inquiry. See *Amado*, 758 F.3d at 1131; *Ayala*, 756 F.3d at 665–66, 669.

<sup>68</sup> See 758 F.3d at 1131. In particular, the Ninth Circuit characterized the situations described in *Williams* where the *Richter* presumption has been rebutted as a non-inclusive list of examples, rather than a dispositive or exhaustive framework for addressing the threshold inquiry. See *id.* Further, the court interpreted *Richter*’s protective language to require courts reviewing federal habeas petitions to actually inquire as to whether there were, or could have been, arguments supporting a determination that a state court adjudicated a petitioner’s federal claim on the merits. See *id.*

<sup>69</sup> See 756 F.3d at 665–66. The court found that the *Richter* presumption was rebutted because the state court likely applied a harmless error standard to adjudicate the petitioner’s federal claim. See *id.* at 665–67, 669. Alternatively, the court considered the possibility that the state court had overlooked the federal claim. See *id.* at 667–69. Although the federal claim was squarely before the state court, the Ninth Circuit nevertheless looked to the record and found that the state court had necessarily failed to adjudicate the claim on the merits. See *id.* at 669.

<sup>70</sup> See *Childers v. Floyd (Childers V)*, 736 F.3d 1331, 1337–38 (11th Cir. 2013) (Martin, J., dissenting), *cert. denied*, 134 S. Ct. 1558 (2014); see also *Childers v. Floyd (Childers IV)*, 642 F.3d 953, 957 (11th Cir. 2011) (en banc) (per curiam) (stating that the Eleventh Circuit was “called on” to define the threshold inquiry), *vacated*, 133 S. Ct. 358 (2013), *opinion reinstated*, 736 F.3d 1331 (11th Cir. 2013); Petition for Writ of Certiorari, *supra* note 65, at 16–18 (arguing that the Eleventh Circuit created an irrebuttable and “impossibly narrow” standard in its decision). In *Childers IV*, the Eleventh Circuit established a broad and procedurally-oriented approach to defining the threshold inquiry. See *Childers V*, 736 F.3d at 1337–38 (Martin, J., dissenting); Petition for Writ of Certiorari, *supra* note 65, at 17–22; *supra* notes 44–54 and accompanying text. In reinstating its judgment from *Childers IV*, the court in *Childers V* interpreted *Williams* in a narrow manner, isolating the question as only whether a state court overlooked a claim due to “sheer inadvertence.” See *Childers V*, 736 F.3d at 1334 (reconsidering *Childers*’s claim only to examine whether “the evidence leads very clearly to the conclusion that [the] federal claim was inadvertently overlooked in state court” (quoting *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013))); *supra* notes 55–61 and accompanying text. Isolating this narrow language from *Williams* ignores the fact that *Williams* aimed to extend the presumption from *Richter* rather than to define an independent standard that applies to non-summary dispositions. See *Williams*, 133 S. Ct. at 1094; *Childers V*, 736 F.3d at 1335 (Wilson, J., dissenting) (reasoning that the Court in *Williams* ex-

forward, the Eleventh Circuit and other circuits should seek to rework their definitions of the threshold inquiry to more closely adhere to the guidance of the U.S. Supreme Court, to guard against an irrebuttable presumption of deference, and to provide better guidance to the federal district courts.<sup>71</sup>

One important reason for the Eleventh Circuit to redefine its conception of adjudication on the merits is to better align itself with the direction and guidance provided by the U.S. Supreme Court.<sup>72</sup> As a result of the holdings of *Childers IV* and *Childers V*, the Eleventh Circuit has come dangerously close to creating an irrebuttable presumption that a habeas petitioner's claim has been adjudicated on the merits.<sup>73</sup> In *Williams*, however, the Court stated that, although robust, the *Richter* presumption is incontrovertibly rebuttable.<sup>74</sup> Moving forward, the Eleventh Circuit should seek to reinterpret and reincorporate the protective language from *Richter* and *Williams* in order to establish uniformity with the U.S. Supreme Court's guidance on the threshold "adjudicated on the merits" inquiry.<sup>75</sup>

Furthermore, given the burdensome standards that habeas petitioners face, the Eleventh Circuit should adopt a definition of the threshold inquiry that more genuinely reflects the directives of the U.S. Supreme Court in order to preserve and safeguard the vital procedural measure of habeas corpus relief itself.<sup>76</sup> In theory, the threshold inquiry insists that one court—either state or

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tended the protective language and presumption from *Richter*); see also *Ayala v. Wong*, 756 F.3d 656, 667 (9th Cir. 2013) (holding that the presumption from *Richter* and *Williams* is one and the same). Further, by declining to readdress the substance of its earlier definition of the threshold inquiry, the Eleventh Circuit implicitly relied on and extended its conception of "adjudicated on the merits" provided in *Childers IV*. See *Childers V*, 736 F.3d at 1338 (Martin, J., dissenting); Petition for Writ of Certiorari, *supra* note 65, at 17.

<sup>71</sup> See *Williams*, 133 S. Ct. at 1096; *Harrington v. Richter*, 562 U.S. 86, 99–100 (2011); *infra* notes 72–86 and accompanying text.

<sup>72</sup> See *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 99–100.

<sup>73</sup> See *Childers V*, 736 F.3d at 1337–38 (Martin, J., dissenting); *Childers IV* 642 F.3d at 981–82 (Wilson, J., dissenting).

<sup>74</sup> See *Williams*, 133 S. Ct. at 1096. The narrow interpretation of this directive by the majority in *Childers V* provides almost no meaningful opportunity for a court reviewing a habeas petition to find that a state court did not adjudicate a federal claim on the merits. See 736 F.3d at 1334 (analyzing a state court decision as to whether or not the state court "inadvertently overlooked" the federal claim); *id.* at 1338–39 (Martin, J. dissenting) (expressing a belief that the majority ignored the guidance of the U.S. Supreme Court in *Williams* by maintaining an irrebuttable presumption that a state court has adjudicated a federal claim on the merits); Petition for Writ of Certiorari, *supra* note 65, at 17 (arguing that the Eleventh Circuit's rigid definition of the threshold inquiry contains an irrebuttable presumption). The dissenting opinion goes as far as to argue that the standard developed in *Childers V* in fact created an irrebuttable presumption contrary to the U.S. Supreme Court's instruction in *Williams*. See *Childers V*, 736 F.3d at 1338–39 (Martin, J., dissenting).

<sup>75</sup> See *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 99–100.

<sup>76</sup> See *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 91, 99–100; *Childers IV*, 642 F.3d at 988 (Wilson, J., concurring) ("A right without a remedy for its transgression is no right at all. . . . AEDPA was meant to preclude a criminal defendant's second bite at the constitutional apple—not his first."); Petition for Writ of Certiorari, *supra* note 65, at 26; Andrew L. Adler, *The Non-Waivability of AEDPA*

federal—actually adjudicate the underlying claim on the merits before a court reviewing a habeas petition can apply AEDPA deference.<sup>77</sup> The Eleventh Circuit’s analysis in *Childers IV* and *Childers V*, however, jeopardizes this right of habeas petitioners by minimizing and reading away the protective language provided by the U.S. Supreme Court.<sup>78</sup>

By more dutifully adhering to the direction of the U.S. Supreme Court and reworking its conception of the threshold inquiry, the Eleventh Circuit will in turn be able to provide better guidance to the federal district courts.<sup>79</sup> Currently, trends in the Florida federal district courts indicate the need for the Eleventh Circuit to provide a more clear and workable standard for resolving the threshold inquiry.<sup>80</sup> Certain patterns in the Florida federal district courts

*Deference’s Applicability*, 67 U. MIAMI L. REV. 767, 771–73 (2013) (pointing out the dramatic impact of AEDPA on habeas petitions and the markedly low success rates that habeas petitioners experience). In doing so, the court would provide a meaningful opportunity for lower courts to actually determine whether or not a petitioner’s claim was “adjudicated on the merits.” See *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 91, 99–100.

<sup>77</sup> See 28 U.S.C. § 2254(d) (2012); *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Adler*, *supra* note 76, at 772–73.

<sup>78</sup> See *Childers V*, 736 F.3d at 1338–39 (Martin, J., dissenting) (arguing that the majority disregarded the directive of the Supreme Court in *Williams* by defining the *Richter* presumption in a way that makes it irrebuttable); *Childers IV*, 642 F.3d at 981–82 (Wilson, J., concurring) (asserting that the majority’s deviation from the guidance of the Supreme Court represents a failure to properly balance the deference that is owed to state courts with the need to ensure that “every habeas petitioner has an actual and meaningful opportunity to seek redress for constitutional violations”); *supra* note 70 and accompanying text (describing the rigid and seemingly irrebuttable standard established by the Eleventh Circuit).

<sup>79</sup> See *Petition for Writ of Certiorari*, *supra* note 65, at 26 (explaining how divergent interpretations of the threshold inquiry have led to disparate treatment of habeas petitioners and how clarification of the proper definition of the threshold inquiry will help lower courts reviewing habeas petitions reach consistent and just results).

<sup>80</sup> See, e.g., *Coleman v. Sec’y, Fla. Dep’t of Corr.*, No. 2:11-cv-430-FtM-29CM, 2014 WL 4373266, at \*1 (M.D. Fla. Sept. 3, 2014) (providing a definition of adjudicated on the merits that does not acknowledge the *Richter* presumption is rebuttable); *Ginlock v. Sec’y, Fla. Dep’t of Corr.*, No. 5:11-cv-400-Oc-38PRL, 2014 WL 2805274, at \*1 (M.D. Fla. June 20, 2014) (stating that the presumption that a state court has adjudicated a claim on the merits can only be rebutted when the court relied exclusively on state law procedural grounds); *Petition for Writ of Certiorari*, *supra* note 65, at 26 (explaining that federal district courts are responsible for reviewing habeas corpus petitions and this function is impeded when the circuit courts do not provide the lower courts with a clear and workable standard for resolving the threshold inquiry). First, in a number of recent decisions, the Florida federal district courts have ignored the *Richter* presumption and have instead relied on *Ferguson v. Culliver*, a U.S. Court of Appeals for the Eleventh Circuit case from 2008, to establish that summary dispositions constitute adjudications on the merits. See *Coleman*, 2014 WL 4373266 at \*1 (“A state court’s summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference.” (citing *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008))); *Nelson v. Sec’y, Fla. Dep’t of Corr.*, No. 2:11-cv-327-FtM-29CM, 2014 WL 4101638, \*3 (M.D. Fla. Aug. 20, 2014) (same); *Barnes v. Sec’y, DOC*, No. 2:11-cv-362-FtM-29CM, 2014 WL 4092460, \*1 (M.D. Fla. Aug. 19, 2014) (same). Despite being decided after *Richter* and *Williams*, these federal district court cases make no reference to the rebuttable nature of the “adjudicated on the merits” presumption, a principle that the U.S. Supreme Court repeatedly emphasized in *Richter* and *Williams*. See *Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 99–100; *Coleman*, 2014 WL 4373266 at \*1;

indicate that confusion over the proper definition and application of the threshold inquiry is not limited to the U.S. Circuit Courts of Appeals.<sup>81</sup> Florida federal district courts rely on Eleventh Circuit precedent in handling habeas petitions and, therefore, Eleventh Circuit habeas petitioners would benefit greatly from the development of a standard that further incorporates the protective language of *Richter* and *Williams*.<sup>82</sup>

In subsequent cases, the Eleventh Circuit, and other circuits with similarly stringent understandings of the threshold adjudicated on the merits inquiry, should adopt the interpretation of the “adjudicated on the merits” standard provided by the Ninth Circuit.<sup>83</sup> Such an interpretation gives meaningful consideration to the protective language in *Richter* and *Williams* and helps to guard against the creation or implementation of an irrebuttable standard in subsequent cases.<sup>84</sup> Further, closer adherence to the U.S. Supreme Court’s directive in *Richter* and *Williams* that the *Richter* presumption is rebuttable will help promote uniformity between the courts and greater predictability of results for habeas petitioners.<sup>85</sup> Although it may be a more ambiguous standard than the rigid interpretations from *Childers IV* and *Childers V*, preference must be giv-

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*Nelson*, 2014 WL 4101638, at \*3. Also, even after the decisions of *Williams* and *Childers V*, some federal district court decisions have continued to cite *Childers IV* for the proposition that a federal claim should be considered adjudicated on the merits absent a state law procedural bar to the contrary. *See Ginlock*, 2014 WL 2805274, at \*1 (“[U]nless the state court clearly states that its decision was based solely on a state procedural rule [the court] will presume that the state court has rendered an adjudication on the merits when the petitioner’s claim ‘is the same claim rejected’ by the court.” (quoting *Childers IV*, 642 F.3d at 969)); *Roberts v. Florida*, No. 2:11-cv-364-FtM-38DNF, 2014 WL 2600089, at \*2 (M.D. Fla. June 9, 2014) (same); *Hutchins v. Sec’y, DOC*, No. 2:11-cv-210-FtM-38DNF, 2014 WL 2212082, at \*2 (M.D. Fla. May 28, 2014) (same); *Love v. Sec’y, DOC*, No. 2:11-cv-546-FtM-29CM, 2014 WL 2155240, at \*4 (M.D. Fla. May 22, 2014); *Burrow v. Sec’y, Dep’t of Corr.*, No. 2:11-cv-60-FtM-29UAM, 2014 WL 1092452, at \*2 (M.D. Fla. Mar. 19, 2014) (same).

<sup>81</sup> *See Coleman*, 2014 WL 4373266, at \*1; *Ginlock*, 2014 WL 2805274, at \*1; *supra* notes 79–80 and accompanying text.

<sup>82</sup> *See supra* notes 79–81 and accompanying text; *see also* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 245 (2006) (pointing out that federal district courts look to the U.S. Supreme Court and then to the U.S. Courts of Appeals for the circuit where the district court is located in order to obtain legal guidance and precedent).

<sup>83</sup> *See Amado v. Gonzalez*, 758 F.3d 1119, 1131 (9th Cir. 2014) (recognizing and incorporating the rebuttable nature of the *Richter* presumption into the court’s analysis of the threshold inquiry); *Ayala*, 756 F.3d 665–667, 669 (explaining that the *Richter* presumption can be rebutted for numerous reasons and therefore state court decisions should be scrutinized to determine if there was in fact an adjudication on the merits).

<sup>84</sup> *See Williams*, 133 S. Ct. at 1096; *Richter*, 562 U.S. at 99–100; *Amado*, 758 F.3d at 1131; *Ayala*, 756 F.3d at 665–67, 669; *Childers IV*, 642 F.3d at 987–88 (Wilson, J., dissenting); *see also* Petition for Writ of Certiorari, *supra* note 65, at 21–22 (arguing that the Eleventh Circuit’s definition of the threshold inquiry completely ignores the Supreme Court’s directive in *Richter* and *Williams* to not create an irrebuttable presumption in favor of finding that a state court has adjudicated a claim on the merits).

<sup>85</sup> *See* Petition for Writ of Certiorari, *supra* note 65, at 26.

en to the Ninth Circuit's analysis to preserve a shred of the integrity and meaning of the threshold "adjudicated on the merits" inquiry in future cases.<sup>86</sup>

### CONCLUSION

In *Childers IV* and *Childers V*, the U.S. Court of Appeals for the Eleventh Circuit's attempt to clarify the threshold inquiry had the ironic effect of further exacerbating the circuit split regarding the proper interpretation and application of the "adjudicated on the merits" requirement. In a subsequent decision, the Eleventh Circuit should reexamine *Richter* and *Williams* in an effort to better balance the deference owed to state courts with the right of habeas petitioners to have one court actually consider their federal claim on the merits. This approach should be followed by other circuits who have adopted similarly narrow and inattentive interpretations of the threshold inquiry. A definition of the threshold inquiry that aims to substantively analyze whether or not a habeas petitioner has had their claim adjudicated on the merits will help protect against the creation of an irrebuttable presumption and per se AEDPA deference, a prospect that is contrary to the intention and proper function of habeas corpus writs.

CHRIS SKALL

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<sup>86</sup> See *Amado*, 758 F.3d at 1131; *Ayala*, 756 F.3d at 665–67, 669; *Cannedy v. Adams*, 706 F.3d 1148, 1167 (9th Cir. 2013) (Kleinfeld, J., dissenting) (advocating against the Ninth Circuit majority's attempt to discern whether or not a claim was adjudicated on the merits in favor of an irrebuttable presumption); *supra* notes 67–69 and accompanying text.